Hong Leong Bank Bhd v M Muthiah @ Nagappan & Anor and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–8–03 OF 2013(W) AND 02–9–03 OF 2013(W)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ABDULL HAMID EMBONG, AHMAD MAAROP AND ZALEHA ZAHARI FCJJ
7 NOVEMBER 2013

Banking — Banks and banking business — Guarantees — Three banking facilities granted to borrower — Default in repayment — Issuance of separate notices of demand — Commencement of civil proceedings for recovery of sum borrowed — Appeal against decision of Court of Appeal in reversing decision of High Court — Whether letter of demand must state correct amount due — Whether sum demanded valid

The appellant ('the plaintiff') granted three banking facilities to one Sri Tanjung Travel Sdn Bhd ('the borrower') which comprised a bank guarantee of RM100,000, a term loan of RM565,000 and overdraft facility of RM3m. The facilities were guaranteed by the respondents ('the defendants'). When the borrower defaulted in repayment, the plaintiff issued separate notices of demand yet the borrower and the defendants all failed to make any settlement. The plaintiff then commenced civil proceedings against all parties for the recovery of the sum borrowed. The issues raised in the High Court were whether the defendants' total maximum liability under the two guarantees was RM5,665,000 as at the date of demand, whether the demand was bad; whether there must be separate letters of demand issued for each guarantee; and what was the amount outstanding. The High Court allowed the plaintiff's claim but the decision was reversed by the Court of Appeal as it was held that the letter of demand must state the correct amount due to the plaintiff; and with regard to conclusive evidence clause in cl 15 of the two guarantees, it was held that it was only applicable to the borrower, not the guarantors. Hence, the present appeal. The primary issue in the present appeal was whether the plaintiff's claim was limited to the sum of RM5,665,000 and if the answer was in the positive, the next issue was whether the plaintiff's notice of demand addressed to the defendants demanding the sum of RM9,059,767 was rendered invalid.

Held, allowing the appeal with costs:

(1) It was common ground that the guarantee in the present case was an on demand guarantee. As such, there was stringent requirement that a demand must be issued notifying the debtor that the creditor was

demanding repayment of the debt. However, contrary to the finding of the Court of Appeal, there was no requirement for the notice of demand to state the precise amount due and payable to the creditor. The purpose of the demand was only to give notice to the debtor that the creditor was demanding repayment of the sum borrowed (see paras 25 & 29).

(2) The approach to be adopted in interpreting the proviso to the relevant clause was to read the guarantee agreement as a whole. The proviso could not be read in isolation. Taking that approach, it was clear as to what was the intention of the parties to the agreement as all the three guarantees were similarly worded (see para 34).

(3) As a continuing guarantee generally, the liabilities of the guarantors were not confined to the principal sum alone but should include interest arising from the loan plus other charges. This was further fortified by the provision in the relevant clause to the effect that 'the guarantors shall for the purpose of the debt be deemed to be principal debtors'. As principal debtors, the defendants liability was not restricted to sum of RM5,665,000 but for the whole sum due and owing to the creditor by the principal debtor which was, in this case, the borrower. It was clear beyond doubt that the liabilities of the defendants could not be limited to the sum of RM5,665,000 (see para 36).

[Bahasa Malaysia summary

Perayu ('plaintif') memberikan tiga kemudahan perbankan kepada satu syarikat bernama Sri Tanjung Travel Sdn Bhd ('peminjam') yang terdiri daripada jaminan bank sejumlah RM100,000, pinjaman berjangka sejumlah RM565,000 dan kemudahan overdraf sejumlah of RM3 juta. Kemudahan-kemudahan dijamin oleh responden-responden ('defendan-defendan'). Apabila peminjam mengingkari bayaran semula, plaintif mengeluarkan notis-notis tuntutan yang berasingan walau bagaimanapun peminjam dan defendan-defendan kesemuanya gagal untuk membuat apa-apa bayaran. Plaintif kemudiannya memulakan prosiding sivil terhadap kesemua pihak untuk mendapatkan semula jumlah yang dipinjam. Isu-isu yang dibangkitkan di Mahkamah Tinggi adalah sama ada liabiliti maksima keseluruhan defendan-defendan di bawah kedua-dua jaminan adalah RM5,665,000 pada tarikh tuntutan tersebut, sama ada tuntutan adalah kabur; sama ada mesti terdapat surat tuntutan berasingan dikeluarkan untuk setiap jaminan; dan apakah jumlah yang masih belum dibayar. Mahkamah Tinggi membenarkan tuntutan plaintif tetapi keputusan telah diakas oleh Mahkamah Rayuan kerana ia diputuskan bahawa surat tuntutan mesti menyatakan jumlah yang betul yang mesti dibayar kepada plaintif; dan berkenaan kepada keterangan konklusif klausa 15 kedua-dua jaminan tersebut, ia diputuskan bahawa ia hanya boleh diguna pakai kepada peminjam, bukan penjamin-penjamin. Maka, rayuan ini. Isu utama dalam rayuan ini adalah sama ada tuntutan plaintif dihadkan kepada jumlah RM5,665,000 dan jika

jawapan adalah positif, isu berikutnya adalah sama ada notis tuntutan plaintif yang ditujukan kepada defendan-defendan menuntut sejumlah RM9,059,767adalah tak sah.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah alasan biasa bahawa jaminan di dalam kes ini adalah atas jaminan tuntutan. Oleh itu, terdapat kehendak ketat bahawa tuntutan mesti dikeluarkan memberitahu penghutang bahawa pemiutang menuntut bayaran semula hutang. Walau bagaimanapun, bertentangan kepada dapatan Mahkamah Rayuan, tiada kehendak untuk notis tuntutan menyatakan jumlah tepat yang patut dibayar dan kena bayar kepada pemiutang. Tujuan tuntutan hanya untuk memberikan notis kepada penghutang bahawa pemiutang menuntut bayaran semula jumlah yang dipinjam (lihat perenggan 25 & 29).

(2) Pendekatan untuk digunakan dalam mentafsirkan peruntukan kepada klausa relevan adalah untuk membaca perjanjian jaminan sebagai keseluruhan. Peruntukan tidak dapat dibaca berasingan. Mengambil pendekatan ini, adalah jelas apa yang menjadi niat pihak-pihak kepada perjanjian memandangkan kesemua ketiga-tiga jaminan perkataannya diolah secara sama (lihat perenggan 34).

(3) Sebagai jaminan berterusan selalunya, liabiliti-liabilti penjamin tidak terbatas kepada jumlah utama semata-mata tetapi patut melibatkan faedah yang berbangkit daripada pinjaman dan caj-caj yang lain. Ini selanjutnya diperkukuhkan oleh peruntukan dalam klausa relevan kepada efek bahawa 'the guarantors shall for the purpose of the debt be deemed to be principal debtors'. Sebagai penghutang-penghutang utama, liabiliti defendan-defendan tidak terhad kepada jumlah RM5,665,000 tetapi untuk jumlah keseluruhan yang patut dibayar dan terhutang kepada pemiutang oleh penghutang utama yang mana adalah dalam kes ini, peminjam. Adalah jelas melampaui keraguan bahawa liabiliti defendan-defendan tidak boleh dihadkan kepada jumlah RM5,665,000 (lihat perenggan 36).]

Notes

For a case on guarantees, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 2443.

Cases referred to

Bache & Co (London) Ltd v Banque Vernes et Commerciales de Paris [1973] 2 Lloyd's Rep 437, CA (refd)

Bank Pembangunan (M) Bhd v Limpo Sdn Bhd [1998] 4 MLJ 433, HC (refd)

Bank of Baroda v Panessar and others [1987] Ch 335, Ch D (refd)

Bunbury Foods Pty Ltd and another v National Bank of Australasia Ltd and another (1984) 51 ALR 609, HC (distd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (folld)
Chung Khiaw Bank Malaysia Bhd v Raju Jayaraman Kerpaya [1995] 3 AMR 2337, HC (consd)
Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283, HC (distd)
Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 MLJ 328, CA (refd)
O'Day v Commercial Bank of Australia Ltd (1933) 50 CLR 200, HC (refd)
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155, SC (distd)
Pacific Bank Bhd, The v Chan Peng Leong [1998] 2 MLJ 613; [1998] 2 CLJ 440, CA (refd)
Public Bank Bhd, The v Chan Siok Lie & Ors [1989] 2 MLJ 305; [1990] 1 CLJ 564, HC (refd)
Shell Marketing Co of Borneo Ltd v Tan Sri Datuk Wee Boon Ping [1990] 1 CLJ 564, HC (consd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31, CA (refd)

Appeal from: Civil Appeal Nos W-02–2791 of 2010 and W-02–2793 of 2010 (Court of Appeal, Putrajaya)

John Wong Yok Hun (Chan Hwee Li with him) (Azim Tunku Farik & Wong) in Civil Appeal Nos 02–08–03(W) and Civil Appeal 02–09–03(W) for the appellant.
Lim You Shyang (Lim You Shyang & Co) in Civil Appeal No 02–08–03(W) for the respondents.
Ahmad Moosdeen (Goh Keng Tat with him) (Chan Moosdeem & Partners) in Civil Appeal No 02–09–03(W) for the respondents.

Arifin Zakaria Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal dated 4 December 2012 in allowing the respondents' appeal with costs. Leave to appeal was granted by this court on 11 March 2013 on the following questions:

Question 1

Where a guarantee is made payable 'on demand', whether a notice of demand issued to a surety there under:

(a) to be a valid and effective to crystallise that surety's liability to pay on the guarantee; and

(b) accordingly, to crystallise the 'creditor's' cause of action against that surety;

must state the precise amount due and owed by the surety to the creditor?

Question 2

In the event the answer to question 1 above is in the negative and the notice of demand does not state the precise amount due and owed by a surety, 'whether the precise amount due and payable by a surety can be subsequently adjudicated upon in court proceedings and the surety be made liable to pay the amount adjudicated to be due and owed under the guarantee?'

In this judgment, the appellant will be referred to as the plaintiff, and the respondents will be referred to as the defendants as in the trial court.

THE FACTS

[2] The facts relevant to this appeal are as follows:

These two appeals, namely Civil Appeal No 02(i)–8–03 of 2013(W) and Civil Appeal No 02(f)–9–03 of 2013(W) ('the first and second appeal respectively') arose out of the same suit, ie, High Court Kuala Lumpur Civil Suit No D1–22–283 of 2006 and with agreement of parties were heard together.

[3] The plaintiff, a bank, granted three banking facilities to Sri Tanjung Travel Sdn Bhd (the first defendant in the High Court proceeding/'the borrower') upon terms as contained in two separate letters of offer dated 13 and 16 August 1996. The facilities comprised of a bank guarantee of RM100,000, a term loan of RM565,000 and an overdraft facility of RM3m.

[4] Subsequently, the second defendant gave a personal guarantee for a sum of RM500,000 through a letter dated 15 August 1996. At the same time, all defendants stood as guarantors vide two separate guarantees dated 9 April 1997 and 28 February 1998 for the sum of RM3,665,000 and RM2m, respectively. The terms in both guarantees are similar. The fourth defendant also executed two separate charges in favour of the plaintiff in respect of properties held under HS(M)14851 No PT 21339 and HS(M)14852 No PT 21340 both in Mukim Kapar, Bukit Raja, Selangor as security for the banking facilities granted.

[5] It should also be noted that second defendant was at the material time a director of the borrower, while the third and fourth defendants were the shareholders of the borrower.

[6] The borrower defaulted in repayment of the banking facilities. The

plaintiff issued separate notices of demand dated 9 November 2005 to the borrower and the defendants. The borrower and the defendants failed to make any settlement.

[7] For ease of reference, we reproduce below the relevant provisions of the guarantees:

> … jointly and severally *guarantee payment on demand* upon us of all monies and liabilities …
>
> *together with interest on all such debts and liabilities to the date of payment* …
>
> Provided that the total sum recoverable from us hereunder is limited to the sum of [RM3,665,000.00 + RM 2,000,000.00 = RM5,665,000.00] owing or incurred to the Bank as aforesaid at the date of demand for the same is made by the Bank or discontinuance by any means of this guarantee by any of us …. (Emphasis added.)

PROCEEDINGS IN THE HIGH COURT

[8] The plaintiff commenced civil proceeding against all parties involved. The claims were for:

(a) (i) RM8,834,348.11 for the overdraft facility as at 31 January 2006; and

(ii) interest to accrue at the rate of 3.0%pa above the appellant's base lending rate (as at 31 January 2006 is at the rate of 6.25%) from 1 February 2006 until date of full and final settlement of the overdraft facility;

(b) (i) RM207,752.01 for the term loan facility as at 31 January 2006; and

(ii) interest to accrue at the rate of 3.0%pa above the appellant's base lending rate (as at 31 January 2006 is at the rate of 6.25%) from 1 February 2006 until date of full and final settlement of the overdraft facility;

[9] On 19 September 2007, the borrower was wound up pursuant to a petition filed by a third party. Thus, the trial was proceeded against the second, third and fourth defendants (guarantors) only.

[10] Four issues were raised before the High Court, namely:

(a) whether the defendants' total maximum liability under the two guarantees is RM5,665,000 as at the date of demand;

(b) whether the demand is bad because the wrong amount was stipulated in the letter of demand;

(c) whether separate letters of demand must be issued for each guarantee; and

(d) what is the amount outstanding.

[11] In dealing with the first issue, the High Court held that:

> … What the defendants have done is to fragment the reading and interpretation of cl 1. That is quite inappropriate as I have said earlier, the guarantee must be read as a whole and never piece-meal. In fact, the interpretation suggested by learned counsel for the defendants would render the earlier parts of the clause of no effect. As it is, the imposition of 'interest on all such debts and liabilities' is right up to the 'date of payment'. If the maximum sum is only the sum arrived at or crystallsed as at the date of the demand, then that provision for imposition of interest can never be realised. Such a reading of the guarantee is wrong and cannot be the understanding and sense in which the terms of cl 1 are used. Neither could it be the intention of the parties as express by the language used. Further, the proviso in cl 1 goes on to say that 'the total sum recoverable … is limited to the sum of [RM3,665,000.00 + RM 2,000,000,000.00 = RM 5,665,000.00] owing or incurred to the Bank as aforesaid at the date that demand for the same is made by the Bank … together with such further sum for interest thereon …'. The deployment of the word 'together' here does not mean and the parties cannot be taken to have intended it to mean inclusive'. Rather, that it means 'in addition to' or 'as well'. The reading suggested by the defendants is also erroneous having regard to the fact that the object of the letter of demand is really to require the defendants to keep to their part of the bargain. It is the failure to pay on such demand that the cause of action arises.

[12] In dealing with the second issue, the High Court held that there is no exceptional circumstances warranting precise stipulation of the sums due as at the date of the demand. Significantly, there is no evidence from any of the defendants that they had inquired on the precise amount due or even challenged the amount stipulated in the notice.

[13] With regard to the third issue, the High Court held that there is no requirement that a separate letter of demand must be issued for each guarantee.

[14] In dealing with the fourth issue, the High Court held that:

> … Accordingly, I find that the plaintiff's claim is proved not only by the evidence of PW1 and the defendants but also by the presence of the certificate of indebtedness tendered. This certificate is binding and sufficient proof of the amount due from the defendants — see *Cempaka Finance Bhd v Ho Lai Ying & Anor* [2006] 3 CLJ 544.

[15] After a full trial the High Court allowed the plaintiff's claim against the

second, third and fourth defendant as prayed in the amended statement of claim with costs.

PROCEEDINGS IN THE COURT OF APPEAL

[16] The Court of Appeal in reversing the decision of the High Court held, inter alia, that the learned trial judge failed to apply the maximum liability provision in the two guarantees.

[17] In allowing the appeal, the Court of Appeal also held that:

(a) the letter of demand must state the correct amount due to the plaintiff; and

(b) with regard to conclusive evidence clause in cl 15 of the two guarantees, the Court of Appeal held that it is applicable only to the borrower and not to the guarantors.

THE ISSUES BEFORE THIS COURT

[18] This court had on 11.3.2.2.13 granted the plaintiff leave to appeal against the decision of the Court of Appeal dated 4 December 2012 on the two questions of law set out earlier.

[19] The principal issue before this court is whether the plaintiff's claim is limited to the sum of RM5,665,000 as stated in the proviso to cl 1 of the guarantees. If the answer to the above issue is in the positive, the next issue is whether the plaintiff's notice of demand dated 9 November 2005 addressed to the defendants demanding the sum of RM9,059,767.17 is rendered invalid.

[20] Learned counsel for the plaintiff conceded that the cause of action in an 'on demand' guarantee is crystallised or triggered by a valid and effective notice of demand. If the demand is invalid, then it is as good as no demand having been made and no cause of action could arise from such an invalid demand. On this point, learned counsel relied on the case of *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613; [1998] 2 CLJ 440.

[21] Learned counsel for the plaintiff further submitted that it is settled law that guarantees are payable on demand. The purpose of the demand is merely to trigger the guarantor's obligation to pay on the same. However, there is no requirement that the demand must specifically mention the precise amount that is due and owing. In support, learned counsel referred us to the following authorities: *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328;

Bank Pembangunan (M) Bhd v Limpo Sdn Bhd [1998] 4 MLJ 433; and *Bank of Baroda v Panessar and others* [1987] Ch 335.

[22] The defendants' contention is that their liability is limited to the sum of RM5,665,000 only based on the proviso to cl 1 of the guarantees. Since the demand was for RM9,059,767.17, far in excess of the amount due, the notice of demand is defective and invalid.

[23] The High Court disagreed with the defendants and held that the defendants' liabilities as guarantors arose when there was a valid or real demand for payment made on them, and on the failure to pay upon such demand, that the cause of action accrued. The High Court relied on the case of *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31.

[24] The Court of Appeal in reversing the decision of the High Court held that although it may not be necessary to state the actual amount in the demand addressed to the principal debtor (the borrower), the same does not apply to a demand against a guarantor wherein the creditor is required to specify the exact amount. On that premise, the Court of Appeal held that the notice of demand in the present case was bad in law. In support, the Court of Appeal relied on the following authorities: *Bunbury Foods Pty Ltd and another v National Bank of Australasia Ltd and another* (1984) 51 ALR 609, *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155.

[25] It is common ground that the guarantee in the present case is an on demand guarantee. As such there is stringent requirement that a demand must be issued notifying the debtor that the creditor is demanding repayment of the debt. However, contrary to the finding of the Court of Appeal, we are of the view that there is no requirement for the notice of demand to state the precise amount due. This was the decision of the Court of Appeal in *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328 (see also *Chung Khiaw Bank Malaysia Bhd v Raju Jayaraman Kerpaya* [1995] 3 AMR 2337 and *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305; [1990] 1 CLJ 564).

In *Nik Che Kok @ Nik Soo Kok*'s case, the Court of Appeal relied on the High Court of Australia in *O'Day v Commercial Bank of Australia Ltd* (1933) 50 CLR 200 where it said:

> Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a demand is for the purpose of bringing home to the debtor that the creditor is demanding its money.

[26] Further support may be found in the case of *Chung Khiaw Bank Malaysia Bhd v Raju Jayaraman Kerpaya* [1995] 3 AMR 2337 where Abdul Hamid Hj Mohamed J (as he then was) referred with approval to the case of *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305, where at p 308 Shanker J (as he then was) observed:

> Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in a notice, the notice will be invalidated.

In the same case, Abdul Hamid Hj Mohamed J (as he then was) also cited with approval the case of *Shell Marketing Co of Borneo Ltd v Tan Sri Datuk Wee Boon Ping* [1990] 1 CLJ 564. In that case it was held that even though the amounts stated in the letters of demand were more than the amount finally claimed, did not prevent the judge from giving summary judgment for the plaintiff.

[27] In the present case, the Court of Appeal came to the opposite finding. In coming to its finding, the Court of Appeal relied heavily on *Bunbury Foods Pty Ltd and another v National Bank of Australasia Ltd and another*, where the Australian High Court stated:

> There is perhaps a stronger case for saying that, when a third party eg a guarantor, is called upon to pay the debt of another, the creditor should specify the amount. But in the circumstances of this case it is unnecessary to explore the problem further.

With respect, in our view, this statement is a mere obiter, as that was not the issue before the court. Perhaps it should be made clear that in *Bunbury Foods Pty Ltd*, the claim was against the borrower not against the guarantor. And in that case it was held that notice of demand is not invalid because it does not specify the sum owing and the plaintiff bank was held to be entitled to appoint the receiver and manager.

[28] Further, we found the following authorities referred to by the Court of Appeal namely, *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* and *Orang Kaya Paduka Wan Ahmad Isa Shukri bin Wan Rashid* are distinguishable from the present case. In *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd*, it concerns with application for order for sale. It is trite law that an exact amount must be specified in such an application. While, in the case of *Orang Kaya Paduka Wan Ahmad Isa Shukri bin Wan Rashid* the defendants were only served a carbon copy of the notice of demand. So, the court rightly held that there was no proper demand made against the guarantors.

[29] For the above reasons we hold that it is not mandatory for the notice of demand to state the exact amount due and payable to the creditor. The purpose of the demand is only to give notice to the debtor that the creditor is demanding repayment of the sum borrowed. Accordingly our answer to the first question is in the negative.

[30] We will now deal with the second issue.

[31] In this case the plaintiff's claim as per the statement of claim, and supported by the certificate of indebtedness and PW1's evidence, as at 31 January 2006 was for:

(a) the sum of RM8,834,348.11 for the overdraft facility;

(b) the sum of RM207,752.01 for the term loan facility; and

(c) interest at the rate of 3.0%pa above the plaintiff's base lending rate from 1 February 2006 until date of full and final settlement for both facilities.

The amount claimed as at 23 August 2008 was for:

(a) the sum of RM9,711,347.24 for the overdraft facilty;

(b) the sum of RM323,774.49 for the term loan facility; and

(c) interest at the rate of 3.0%pa above the plaintiff's base lending rate from 23 August 2008 until date of full and final settlement for both facilities.

[32] Relying on *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544, the High Court, upheld the plaintiff's claim for the amount stated above. In that case it was held that the certificate of indebtedness was binding and sufficient proof of the amount due.

[33] The Court of Appeal in the present case held that the certificate of indebtedness is not binding on the guarantors on the ground that the guarantors' liabilities are governed by the maximum liability proviso in cl 1 of the guarantees.

[34] In this regard, we agree with the learned High Court judge that the approach to be adopted in interpreting the proviso to cl 1 is to read the guarantee agreement as a whole. The proviso cannot be read in isolation. Taking that approach, it becomes clear what was the intention of parties to the agreement. All the three guarantees were similarly worded. Therefore, suffice for our purpose to consider one of the guarantees. Take the guarantee in pp 45–48 in the appellant's core bundle. It opens with the words, 'In consideration of you, EON BANK BERHAD … making or continuing advances or otherwise giving credit or affording banking facilities and accommodation … to SRI TANJUNG TRAVEL SDN BHD …' the defendants '… jointly and severally gurantee payment on demand upon us of all monies and liabilities … owing or incurred to the Bank from or by the customer …'.

The proviso to cl 1 reads:

> Provided that the total sum recoverable from us hereunder is limited to the sum of [RM3,665,000.00 + RM 2,000,000.00 = RM5,665,000.00] owing or incurred to the Bank as aforesaid at the date of demand for the same is made by the Bank or discontinuance by any means of this guarantee by any of us or by the executors administrators or legal representatives of any of us howsoever such sum is arrived *at together with such further sum for interest thereon and other commission banking charges and legal and other costs charges and expenses whether incurred in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money hereby guaranteed or otherwise howsoever as shall accrue due to the Bank within twelve months before or any time after the date of demand or discontinuance as aforesaid*. (Emphasis added.)

[35] The expression 'together with such further sum for interest …' in the proviso clearly indicates that the extent of the defendants' liabilities are not limited to the sum of RM5,665,000 but should also include other sums comprising of interest on the loan, commission or other charges named therein.

[36] Apart from that, cl 4 stipulates that the guarantee is a continuing guarantee upon each of the guarantors. As a continuing guarantee generally, the liabilities of the guarantors is not confined to the principal sum alone but should include interest arising from the loan plus other charges. This is further fortified by the provision in cl 1 to the effect that 'the guarantors shall for the purpose of the debt be deemed to be principal debtors'. As principal debtors the defendants liability is not restricted to sum of RM5,665,000 but for the whole sum due and owing to creditor by the principal debtor (the borrower). Considering the above provisions it is clear beyond doubt that the liabilities of the defendants could not be limited to the sum of RM5,665,000 as contended by the defendants.

[37] Clause 19 of the guarantees provides that the certificate of indebtedness is conclusive evidence as against the defendants. In the circumstances we hold that the certificate of indebtedness is binding and is sufficient as proof of the amount due by the defendants (see *Cempaka Finance Bhd v Ho Lai Ying & Anor*; *Bache & Co (London) Ltd v Banque Vernes et Commerciales de Paris* [1973] 2 Lloyd's Rep 437).

[38] In view of our findings above, it is not necessary for us answer the second question posed to us in this appeal.

[39] In the upshot the appeal is allowed with cost both here and the courts below and the order of the Court of Appeal accordingly set aside.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor